

Law Office of Walter J. Rodby
WALTER J. RODBY (5594)
733 Bishop Street, Suite 2050A
Honolulu, Hawai'i 96813
Tel.: (808) 232-6313
Email: AttorneyRodby@msn.com

Law Office of Caroline M. Elliot
CAROLINE M. ELLIOT (11541)
P.O. Box 3254
Honolulu, Hawai'i
Tel.: (808) 570-6003
Email: cme@carolineelliot.com

Attorneys for Defendant John Stancil (02)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL J. MISKE, JR. (01),
JOHN B. STANCIL (02),
DELIA FABRO-MISKE (12)

Defendants.

CR. NO. 19-00099-DKW-KJM

**JOINT DEFENDANTS'
SUPPLEMENTAL BRIEF RE
EXCLUSION OF WITNESSES
FROM COURTROOM (ECF NOS.
1057, 1173, & 1193)**

**JOINT DEFENDANTS' SUPPLEMENTAL BRIEF RE EXCLUSION OF
WITNESSES FROM COURTROOM (ECF NOS. 1057, 1173, & 1193)**

SUPPLEMENTAL BRIEF

Following a hearing on December 8, 2023 concerning over 50 Motions in Limine filed by all parties, the Court requested supplemental briefing on three issues. This brief addresses the second of those issues: whether the family members of Johnathan Fraser qualify as “crime victims” under the Crime Victims’ Rights Act, and thus are allowed to be present during trial as an exception to the exclusionary rule under Federal Rule of Evidence 615, even though they are going to be trial witnesses, in a missing person’s case which is charged as a VICAR murder, a murder-for-hire resulting in death, and a kidnapping resulting in death. ECF No. 673, PageID. 4452-4456 (counts 2, 4 & 5).

Under Title 18 United States Code Section 3771(e)(2)(A), “[t]he term ‘crime victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.” Under Title 18 United States Code Section 3771, “[i]n the case of a crime victim who is ... deceased, ... family members ... may assume the crime victim’s rights under this chapter” The issue in this case, as opposed to the majority of other homicide cases where the fact that someone is deceased is not a contested fact, due to a forensic pathologist’s testimony regarding manner, means and cause of death, here there is no such proof that Mr. Fraser is deceased.

The government relies solely on presumptions and assumptions in concluding that Mr. Fraser has died. After an extensive search, the Defendants' have not found any relevant case law that it can cite for the Court. Even in homicide cases where no body is found, there is typically an agreement that a decedent exists; that is, that a death occurred, whether at the hands of the accused or some other means. In this case, however, there is very little actual evidence that a death has in fact occurred, and it will be countered by other evidence that Mr. Fraser was seen after the time he was supposedly killed, allegedly by members of the so-called "Miske Enterprise".

The question, then, becomes what the standard is to say that someone is actually "deceased". While there isn't relevant case law on point, there is still some guidance on this issue. Every state, including Hawai'i, has a statute that governs when a person can be declared dead without a body or other compelling evidence that the person is deceased. In Hawai'i, the probate code calls for a presumption of death when the person has been absent "for a continuous period of five years, during which the individual has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry." H.R.S. § 560:1-107(5). Additionally, there is an additional presumption that the person's death "occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier".

Id.

An interested party must file a petition for a “determination of death” which sets forth the last known name and address of the missing person, the person’s spouse, reciprocal beneficiary, or other closest living relatives, the approximate date and description of the person’s disappearance, and a description of all efforts made to locate the person, including affidavits or other testimony of all immediate relatives that they have not had any contact with the person. Hawai`i Probate Rule 150. After the interested party provides appropriate notice, the Court must hold a hearing to determine whether it will issue an Order Determining Death. Hawai`i Probate Rules 152-154.

This process was available to the family members of Johnathan Fraser. No proof has been presented that this process was used by the family of Fraser, as it has been for others. If such proof existed that the Fraser family had followed this process, then there would be support for considering Fraser a decedent under 18 U.S.C. § 3771(e)(2)(A) and his family members crime victims under 18 U.S.C. § 3771(e)(2)(B). The lack of this proof here supports a finding that Mr. Fraser remains a missing person. The government’s own documents produced in discovery list Johnathan Fraser as a missing person’s case. *See* Bates 00022425, 00042988, attached as Exhibit A.

Given the lack of any sort of finding of death by a court of any type, the only

court document that alleges that Mr. Fraser is actually deceased is the Third Superseding Indictment. As the Court is well aware, indictments are not evidence, and jurors are instructed not to consider them as such. 9th Cir. Crim. Jury Instr. 1.2 and 6.2 (2022). If Congress had meant to make the family of alleged murder victims automatically “crime victims” under the Crime Victims’ Rights Act simply by virtue of an indictment charging murder or manslaughter or crimes resulting in death, it could have done so. Congress did not. The Crime Victims’ Rights Act has limitations on who it applies to. The Congressional Research Service published *The Crime Victims’ Rights Act: A Summary and Legal Analysis of 18 U.S.C. § 3771*, updated June 8, 2021, to provide further guidance on the CVRA.¹ While noting that certain crime victims have rights even prior to charges being filed, the analysis still notes that only “the obvious victim of a clearly identifiable federal crime” would have rights under the Act. *Id.* at p. 10-11.

While there may not be case law on point, the application of common sense can help guide this inquiry. A “crime victim” cannot be a “crime victim” in the absence of any sort of showing, finding, documentation, or evidence of any sort, other than an indictment, that an actual crime occurred. In assault cases, there is usually evidence of the complaining witness’s injuries. In fraud cases, there is

¹ Last accessed at <https://sgp.fas.org/crs/misc/RL33679.pdf> on 12/27/23.

usually evidence of a complaining witness's financial loss. In theft cases, there is usually evidence of a complaining witness's loss of personal property. In murder or manslaughter prosecutions, there is usually a decedent's body that demonstrates a death occurred, or some other finding in probate or otherwise that the individual is deceased. In the absence of any of this, including a court's finding that a death has occurred, the government should not be allowed to call someone, or, in this case, multiple people, "crime victims" of a deceased person simply based upon a charge of VICAR murder, murder for hire resulting in death, and kidnapping using a facility of interstate commerce resulting in death. The Court should reject the government's argument and find that members of Mr. Fraser's family can only remain in the courtroom once they are released as trial witnesses.

DATED: December 29, 2023 in Honolulu, Hawai'i.

/s/ Michael J. Kennedy

MICHAEL J. KENNEDY

/s/ Lynn E. Panagakos

LYNN E. PANAGAKOS

Counsel for Defendant

MICHAEL J. MISKE, JR (01)

/s/ Donovan A. Odo

DONOVAN ASAO ODO

/s/ Marcia A. Morrissey

MARCIA A. MORRISSEY

Counsel for Defendant

DELIA FABRO-MISKE (12)

/s/ Walter J. Rodby

WALTER J. RODBY

/s/ Caroline M. Elliot

CAROLINE M. ELLIOT

Counsel for Defendant

JOHN B. STANCIL (02)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all counsel of record via the court's CM/ECF electronic filing system.

DATED: December 29, 2023 in Honolulu, Hawai'i.

/s/ Caroline M. Elliot

CAROLINE M. ELLIOT